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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1047

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Petitioner,

v.

THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD W. BARRETT,
JACK G. EVANS,
1200 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Petitioner.

Of Counsel:
GUY FARMER,
PATTERSON, BELKNAP & FARMER,
1120 Connecticut Ave., N. W.,
Washington 6, D. C.,
HAROLD S. FREEMAN,
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
1200 Union Central Building,
Cincinnati 2, Ohio,

THE JOHNSON & HARDIN CO., LAW PRINTERS
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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Question No. 1	2
Question No. 2	2
Question No. 3	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
The Holding of the Court of Appeals that a Joint Company-Union Grievance Stipulation Was Not a Mandatory Condition Precedent to Arbitration Was Contrary to the Terms of the Grievance and Arbitration Clause of the Collective Bargaining Agreement and the History of Negotiations and the Consequence of an Over-Extension and Misapplication of This Court's Ruling in the Arbitration Trilogy Cases	6
A. The Agreement and the History of Negotiations Demonstrates, as Found by the District Court, that the Joint Stipulation Was a Condition Precedent to Arbitration and the Court of Appeals' Contrary Conclusion Is in Conflict with the Final Decision of Another Federal Court	9
B. The Court of Appeals Exceeded Its Power of Review in Its Finding, Contrary to that of the District Court, that the Contract and Negotiations Evidenced an Understanding by Both Parties that the Joint Stipulation Was Not a Condition Precedent to Arbitration	15

PAGE

Conclusion 16

Appendix A:

Opinion and Judgment of the District Court for the Northern District of California, Northern Division 1a

Opinion of the United States Court of Appeals for the Ninth Circuit 8a

Judgment of the United States Court of Appeals for the Ninth Circuit 17a

TABLE OF CASES

Atkinson v. Sinclair Refining Co., 370 U. S. 238 7

Soap Workers v. Procter & Gamble Mfg. Co., 48 L. R. R. M. 2766 (N. D. Ill. 1960) 10

Teamsters v. Yellow Transit Freight Lines, Inc., 370 U. S. 711 7

United Electrical, Radio & Machine Workers v. General Electric Co., 208 F. Supp. 870 (S. D. N. Y. 1962) 7

United States v. United States Gypsum Co., 333 U. S. 364 16

United Steelworkers v. American Mfg. Co., 363 U. S. 564 6

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593 6

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574 ..... 6, 7, 8, 17

STATUTES

61 Stat. 156, Title 29, U. S. C. § 185 ..... 2, 4, 6

62 Stat. 928, Title 28 U. S. C. § 1254(1) 2

Rule 52(a), Federal Rules of Civil Procedure 3, 16

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THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered herein on February 15, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix A hereto (*infra*, p. 1a)[1] is reported at 50 L. R. R. M. 2972. The opinion of the Court of Appeals, printed in Appendix A hereto (*infra*, p. 8a) is reported at 314 F. 2d 38.

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[1] "*Infra*" references are to the appendices of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1963 (*infra*, p. 17a). A timely petition for rehearing, filed on March 11, 1963, was denied on March 21, 1963 (R. I.: 72).[2] The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the terms of the grievance and arbitration clause of the collective bargaining agreement and the history of its negotiation warrant the Court of Appeals' conclusion, contrary to that of the District Court, that a joint company-union grievance stipulation was not a mandatory condition precedent to arbitration.
2. Whether the above stated conclusion of the Court of Appeals was the consequence of an over-extension and a misapplication of this Court's ruling in the Arbitration Trilogy cases and resulted in a denial of the major premise underlying those cases that arbitration is a matter of agreement.
3. Whether the Court of Appeals exceeded its scope of review under Rule 52(a) by finding contrary to the District Court, that the parties did not intend to make the joint stipulation provision of the contract a condition precedent to arbitration.

STATUTES INVOLVED

The statute involved is Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185(a):

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[2] "R" references are to the volume, page and where necessary the line of the certified record.

> Section 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 52(a) Federal Rules of Civil Procedure is also involved:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Respondent, The Independent Soap Workers of Sacramento, California (hereinafter called the Union), commenced this action in the Superior Court of the State of California. It was removed by the Petitioner, The Procter & Gamble Manufacturing Company (herein called the

Company), to the United States District Court for the Northern District of California, Northern Division, which had jurisdiction under the provisions of Section 301(a) of the Labor Management Relations Act.

The Union sought an order directing arbitration under the terms of the then existing collective bargaining Agreement between the Union and the Company. The Union's motion for summary judgment was denied. Following a trial without a jury before the District Court, the application was denied.

The dispute involved the disqualification on November 21, 1960, of an employee from his job as a tank farm operator at respondent's Sacramento, California, plant as the result of the most recent of several errors he had committed in the performance of his work assignments. He was reassigned to other work. A grievance over the Company's action was processed through Steps 1, 2 and 3 of Article XV(b) of the Agreement without settlement. On December 30, 1960, the Union requested arbitration on the ground that the Company's action was not "proper nor just." The Company declined to arbitrate and declined to enter into a joint stipulation for this purpose, basing its action upon the ground that the dispute did not involve the interpretation or application of any provision of the Agreement.

The Union and the Company had been parties to collective bargaining Agreements at the Sacramento plant since its opening in 1953. Each of those Agreements, including the one existing at the time of the request for arbitration of this dispute, contained the same limited form of an arbitration provision:

> "It is understood that arbitration will be limited to grievance involving the interpretation or application of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in

writing and the Board [of Arbitration] will act only on the stipulation and will not add to nor take away from the terms of this agreement in making this decision."

Upon the evidence submitted at trial, including the Agreement, the bargaining history and the testimony of the witnesses, the District Court found that the Agreement requires a joint stipulation of the grievance as a condition precedent to the continued progress of proposed arbitration, but that a joint stipulation is not a required consequence of previous failures to agree on the disposition of the grievance (*infra*, pp. 5a-6a). The finding was based on the contract language, the intention of the parties as evidenced by the bargaining history, and the applicable judicial decisions involving similar issues. The trial court found that "the terms of this particular provision are (and obviously were intended by the negotiations to be) so weak as to render it totally nugatory" (*infra*, p. 6a). These findings were based upon substantial evidence.

The Court of Appeals made different findings, despite the existence of substantial evidence to support the District Court's findings. The Court of Appeals held that the District Court erred in concluding that either party could refuse to arbitrate based on its unilateral refusal to stipulate the grievance and that the intention of the parties derived from the Agreement and bargaining history was that "the parties must jointly stipulate the grievance in any case in which either party contends, in good faith, that the grievance involves the interpretation or application of the provisions of the agreement" (*infra*, p. 17a). The Court of Appeals remanded the case to the District Court for a determination of whether the grievance involved the interpretation or application of the provisions of the agreement (*infra*, p. 17a).

REASON FOR GRANTING THE WRIT

The Holding of the Court of Appeals That a Joint Company-Union Grievance Stipulation Was Not a Mandatory Condition Precedent to Arbitration Was Contrary to the Terms of the Grievance and Arbitration Clause of the Collective Bargaining Agreement and the History of Negotiations and the Consequence of an Over-Extension and Misapplication of This Court's Ruling in the Arbitration Trilogy Cases.

This Court, in the Arbitration Trilogy [3] and in certain cases following it, has recently undertaken to define the source and boundaries of the obligation to arbitrate under collective bargaining agreements pursuant to Section 301 (a), and the respective functions of the courts on the one hand and of the arbitrators on the other in the arbitral process. The basic principle which emerged from the Arbitration Trilogy cases was that the courts restrict their determinations to, first—the existence of a contractual obligation to arbitrate, and second—the boundaries or scope of that obligation. Since each of the cases referred to contained arbitration clauses concededly binding the employer to arbitrate a general class of dispute, the decisions dwelt upon the second point, namely, the rules of construction applicable to arbitration clauses to determine whether an asserted dispute falls within the boundaries or scope of that general class. Thus, this Court ruled that unless an asserted dispute was expressly excluded from the general class, only the most forceful evidence of a purpose to exclude it from arbitration would suffice, and the courts should not

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[3] *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers* v. *Warrior and Gulf Nav. Co.*, 363 U. S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593.

rule on the merits of an asserted dispute under the guise of determining arbitrability.

The situation in the present case is fundamentally different from the arbitration clauses scrutinized in the Arbitration Trilogy. Here there is no agreement making arbitration of any subject mandatory. Rather, the words of the arbitration clause direct that the arbitration procedures set forth or discretionary: that is, that either party may exercise its discretion against arbitrating any particular dispute by refusing to stipulate the grievance. In the full context of the arbitration procedures of the Agreement together with the history of negotiations discussed below, the required stipulation is seen as a condition precedent to any obligation to arbitrate. The Board of Arbitration is unconditionally limited to act "only on the stipulation."

The contractual situation in the present case is similar to that posed to this Court in *Teamsters* v. *Yellow Transit Freight Lines, Inc.*, 370 U. S. 711, where this Court reversed a holding by the Tenth Circuit upholding an injunction against a labor union prohibiting violation of a no-strike clause. Justices Brennan, Douglas and Harlan noted that the contract's arbitration clause provided for no mandatory system of arbitration,[1] and concluded:

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[1] "Settlement is first to be attempted between the employer and the local union involved and, failing adjustment, negotiated settlement is to be attempted by a joint state committee consisting of equal numbers of employer and union representatives. If a majority of that committee 'settles a dispute,' '[s]uch a decision will be final and binding on both parties.' If a joint state committee fails to settle a dispute, a negotiated settlement is then to be attempted by a joint area committee consisting of equal numbers of employer and union representatives duly elected by the various joint state committees. This is the last stage unless there is agreement at that point to submit unsettled disputes to arbitration. Obviously, either employer or union representatives are free to prevent arbitration." 370 U. S. at 712.

> "Since it is clear that the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute, I agree that no injunction should be granted." 370 U. S. at 711-12.

The rules of the *Warrior & Gulf* case were not applied or cited by these Justices for the reason that there was no agreement between the parties to arbitrate any particular issue. See also, *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238; *United Electrical, Radio & Machine Workers* v. *General Electric Co.*, 208 F. Supp. 870 (S. D. N. Y. 1962).

In misapplying the rules of construction for concededly mandatory arbitration clauses in collective bargaining agreements enunciated by this Court in the Arbitration Trilogy, the Court of Appeals ran afoul of the underlying premises of those cases stated by Mr. Justice Douglas in the following language:

> "The Congress, however, has by § 301 of the Labor-Management Relations Act assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 580, 582.

Through this misapplication of the rules of construction of concededly mandatory arbitration clauses to the question whether the agreement itself compels arbitration the Court of Appeals had unduly overextended the holdings of the Arbitration Trilogy to a point where it has converted discretionary procedures for arbitration to a com-

pulsory system in plain derogation of the only source of the obligation to arbitrate—the agreement between the parties.

The petitioner respectfully suggests that this case affords the Court an excellent and needed opportunity to delineate further the bounds of the obligation to arbitrate, and to differentiate between the rules applicable to construction of the coverage of an agreement to arbitrate and the rules applicable to a determination of whether the parties ever agreed to any system of compulsory arbitration.

A. THE AGREEMENT AND THE HISTORY OF NEGOTIATIONS DEMONSTRATE, AS FOUND BY THE DISTRICT COURT, THAT THE JOINT STIPULATION WAS A CONDITION PRECEDENT TO ARBITRATION AND THE COURT OF APPEALS' CONTRARY CONCLUSION IS IN CONFLICT WITH THE FINAL DECISION OF ANOTHER FEDERAL COURT.

The Agreement involved herein ultimately provides for a system of voluntary arbitration. The matter in dispute must not only be one "involving the interpretation or application of the provisions of the Agreement" but the parties must also be willing to "stipulate the grievance jointly in writing." These two conditions have to be met before any obligation to arbitrate a dispute ever arises. The other terms of the Agreement merely cover the details of handling an arbitration should the joint stipulation be executed.

Article XV of the Agreement starts in paragraph "a" by defining "grievance":

> "A grievance is any difference between the Company and an employee about what any part of this Agreement means or how it should be applied; or any matter directly affecting the employee as to hours of work, wages and working conditions."

Paragraph "b" of Article XV sets forth the grievance procedure from Step 1 through Step 3. The type of griev-

ance subject to arbitration is sharply limited at Step 4 as follows:

> "It is understood that arbitration will be *limited* to grievance involving the interpretation or application of the provisions of this Agreement" (emphasis added).

The Agreement then sets forth the condition precedent which, if met, gives rise to an obligation to arbitrate. The critical language of paragraph "b" of Article XV states:

> "The Company and the Union will *stipulate* the grievance *jointly* in writing and *the Board will act only on the stipulation* and will not add to nor take away the terms of this Agreement in making this decision" (emphasis added).

The choice of the words "stipulate . . . jointly" and "stipulation" clearly evidences that the parties had not bound themselves in advance to arbitrate anything. Before a stipulation can be achieved it is necessary to have an agreement upon its contents. Such an agreement was never achieved, thus no obligation to arbitrate ever arose.

This construction of the terms of the Agreement is in accord with a holding by the United States District Court for the Northern District of Illinois, in *Soap Workers* v. *Procter & Gamble Mfg. Co.*, 48 L. R. R. M. 2766 (N. D. Ill. 1960); where the contract provided that "the arbitrators shall confine their consideration to the grievance stipulated in writing jointly by the Employer and the Union, and shall neither add to nor subtract from the written provisions of the stipulation in this agreement in making a decision." The Court held that the joint stipulation provision of the contract

> "requires as an indispensable condition precedent to the authority of the arbitrators to consider any

'grievance' asserted by a party to the agreement, the execution by both parties of a joint written stipulation of the 'grievance' to which the arbitrators 'must confine their consideration'."

The Court thus refused the Union's request to require the employer to arbitrate a dispute where the employer had refused to enter into a joint stipulation.

The reasoning of the Court of Appeals in the instant case that there would be no reason to restrict arbitration to grievances involving the interpretation or application of the provisions of the agreement if either party could, in any event, evade arbitration by refusing to stipulate the grievance, is in error. As the bargaining history outlined below demonstrates, the two standards appear in the contract for the reason that as a matter of policy the Company does want to agree when the occasion arises to arbitrate any dispute which involves an interpretation or application the provisions of the Agreement, but does not want to arbitrate asserted "grievances" which do not. The requirement of a joint stipulation is necessary in order to safeguard against controversy arising over whether a particular dispute does in fact involve the interpretation or application of the provisions of the Agreement. For this reason each party has been given a veto power over whether a particular dispute may go to arbitration. Thus, both the provision for the joint stipulation and the restriction of grievances to disputes involving the interpretation or application of the provisions of the Agreement are wholly consistent with one another.

The grievance and arbitration clause of the contract involved have been the same since the respective parties negotiated their first contract in 1953. In the negotiations leading up to the present contract in 1960, the Union made a strenuous and unsuccessful attempt to delete the joint stipulation provision of the arbitration clause on the

ground that it gave the Company a veto power over whether an issue went to arbitration. Fortunately, the history of these negotiations was contemporaneously transcribed and introduced into evidence in the District Court when the present case was heard.

The Union's purpose in seeking changes in the arbitration clause was stated to be the following:

> "We . . . feel the way the arbitration clause is now written it gives the Company the absolute say in arbitration, whether anything goes to arbitration or not and we don't feel that is the purpose of the arbitration clause and I will state that we are very, very unhappy with the answers you gave us yesterday about deciding what will go to arbitration because we feel that if we think it is an interpretation of the contract and it is something that legally falls within the arbitration clause then we definitely think it should be taken to arbitration" (R. III:215:9-18).

Later in the negotiations the Union contended that the use of the word "jointly" prevented them from forcing the Company to go to arbitration on a matter where the Union could "set up an argument that it does deal with the contract and you (the Company) can set up an argument that it does not deal with the provisions of the contract." The Company representative remarked that the Union could always "set up an argument that anything does" deal with the contract, therefore in that situation the arbitration provision protected both parties from having to go to arbitration on such disputes (R. III:230:9-18). Thereafter the Company amplified its position further when it stated:

> ". . . the only time we are not willing to go to arbitration is when it falls outside the interpretation or application of the contract *and it is possible to tie a lot of things into the contract that aren't really a part of it and we are not willing to go out and arbitrate on*

all those things" (R. III:235:14-18) (emphasis added).

In the same negotiation session the Union made the following statements through its President, Burl Waits:

> "But if six months later, say we should agree to drop our joint request and let your interpretation stand and six months later we come up and we say now this is an interpretation of the contract and we want to take it to arbitration and you don't agree with us; you don't agree it falls in the category of the interpretation and we say we think it does and you say we are not going to arbitrate it, then what are we going to do" (R. III:231:13-20).

Mr. Mellinger replied for the Company:

> "Well, the only thing is and I have said this before, we have agreed to arbitrate certain things. We have not agreed to arbitrate anything beyond that and if it falls in that range then we are willing to arbitrate and we have never used the joint stipulation to stop arbitration but if it deals with something outside of this range which I am not agreeing to include in the arbitration clause, then we are not willing to arbitrate" (R. III:231:21-26; III:232:1-2).

Mr. Waits answered for the Union:

> "And you want to be the final judge on whether it falls in that category or not" (R. III:232:6-7).

Mr. Mellinger replied that either party had the same right (R. III:232:8-14).

A little later in the same negotiating session the Union withdrew its request to delete the word "jointly" and proposed instead that the following paragraph be inserted in the arbitration clause:

> "If the Company and the Union cannot agree whether the grievance involves the interpretation or application of the provisions of this agreement, a board of arbitrators will be selected to make the decision" (R. III:237:14-17).

The Union also proposed that the entire arbitration clause be deleted or that the wording of the arbitration clause at the Company's Port Ivory, New York, plant be substituted (R. III:210:6-10). In making the latter request the Union asserted that the Port Ivory clause was a much better clause than the one at Sacramento, and that Sacramento should have the same kind of arbitration provision as Port Ivory (R. III:210:13-26; III:211:1-15). The Union's recognition of the limited form of arbitration which was available at Sacramento was acknowledged again when its spokesman made the following assertions at a later session of the negotiations:

> "It [the proposed change in Art. XV] will give us for the first time an arbitration clause" (R. III:245:6-7).
>
> • • • • •
>
> "But you know yourself that actually this [word 'jointly'] is more or less ties our hands if you disagree that it [a grievance] doesn't come under any of the agreements of the contract" (R. III:259:8-10).
>
> • • • • •
>
> *"Well, you speak of talking to lawyers, we have talked to our lawyer about this thing and as far as an arbitration clause is concerned, he says it just isn't any good because it don't mean anything and that is why we are trying to change it"* (R. III:260:25-26; III:261:1-3) (emphasis added).

Finally, after additional negotiations, including further consideration of the Union's proposals to modify Article XV, the Agreement was executed without any change in that article (R. III:282:2-12; I:J(1), Art. XV).

What this bargaining history demonstrates beyond question is that while the Company was willing to commit itself in principle to the arbitration process and was willing to arbitrate grievances which in its view presented genuine questions of contract interpretation, it was reserving for itself and for the Union the right to unilaterally determine whether or not a particular grievance could be taken to arbitration. This bargaining history also shows that the Union, while not liking this state of affairs, nevertheless understood and indeed agreed to this construction of the Agreement which the Union unsuccessfully sought to change.

B. THE COURT OF APPEALS EXCEEDED ITS POWER OF REVIEW IN ITS FINDING, CONTRARY TO THAT OF THE DISTRICT COURT, THAT THE CONTRACT AND NEGOTIATIONS EVIDENCED AN UNDERSTANDING BY BOTH PARTIES THAT THE JOINT STIPULATION WAS NOT A CONDITION PRECEDENT TO ARBITRATION.

On the basis of the factual history of negotiations outlined above, the District Court concluded:

> "[T]he preliminary negotiations leading to the Agreement evidence an understanding by both parties that by this very means either party could unilaterally evade the arbitration provisions of the Agreement" (*infra*, p. 5a).

After stating that it had "carefully reviewed all of the bargaining history in the record," the Court of Appeals held:

> "[T]hat the district court erred in concluding that the parties could unilaterally evade the arbitration provisions of the agreement by the simple expedient of refusing to stipulate the grievance" (*infra*, p. 16a).

This apparently *de novo* review of the record by the Court of Appeals resulted in a clear reversal of the crucial finding of fact by the District Court in this case, i.e., the

intention of the parties as evidenced by the negotiations. Yet this reversal by the Court of Appeals was accompanied by no showing or even statement that the above-stated finding of the trial judge was so "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil procedure and *United States* v. *Gypsum*, 333 U. S. 364[5] that it should be overturned. It follows that the Court of Appeals exceeded its reviewing function under Rule 52(a).

The substituted judgment of the Court of Appeals that the negotiations showed an assurance by the Company to the Union that so long as the grievance dealt with an interpretation or application of the Agreement, the joint stipulation provision would not be used to block arbitration, demonstrates the vice which Rule 52(a) sought to correct.

The Company did give the Union good faith assurances that the Company would not block arbitration by the joint stipulation device of grievances which the Company believed involved the interpretation or application of the Agreement. The history of the negotiations shows in addition that the Company did not want the issue of whether a particular dispute inolved an interpretation or application of the Agreement to be arbitrated or litigated, but rather sought and obtained through the joint stipulation provision the discretion to refuse to arbitrate exercisable by either the Company or Union in the event either of them believed that the issue sought to be arbitrated did not involve the interpretation or application of the Agreement.

CONCLUSION

There is nothing illegal or contrary to public policy in an arbitration agreement whereby the parties provide for

[5] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made." 333 U. S. at 395.

what is in effect an *ad hoc* determination in each case as to whether or not to proceed to arbitration, and, accordingly whereby either party may, by refusing to enter into a joint stipulation of the grievance, block arbitration after the other steps of the grievance procedure have been exhausted. Both the language of the arbitration agreement in the present case and the history of its negotiations clearly demonstrate an intent to construct a system of case-by-case discretionary arbitration rather than an advance commitment to compulsory arbitration To require arbitration in these circumstances is to require a party to submit a dispute to arbitration which he has not agreed so to submit and is thus in direct contravention of the holding of this Court in the *Warrior & Gulf* case.

It is respectfully requested that a writ of certiorari be issued as prayed to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD W. BARRETT,
JACK G. EVANS,
1200 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Petitioner.

Of Counsel:
GUY FARMER,
PATTERSON, BELKNAP & FARMER,
1120 Connecticut Ave., N.W.,
Washington 6, D. C.,
HAROLD S. FREEMAN,
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
1200 Union Central Building,
Cincinnati 2, Ohio.

April 25, 1963.